Watch Co. v. *Ill. Watch Co.* (1901) 179 U. S. 665, 21 Sup. Ct. 270. Accordingly, geographical names and words which are purely descriptive are not the subjects of registered trade-marks. *Bolander* v. *Peterson* (1891) 136 Ill. 215, 26 N. E. 603; *Continental Ins. Co.* v. *Continental Fire Assn.* (C. C. 1899) 96 Fed. 846. But the courts are always alert to protect a man's business reputation, and to prevent the public from being defrauded. Hence, if a descriptive word has been associated with a particular concern so constantly that it inevitably suggests that concern, the courts will not permit its use by a competitor, although in its primary sense it may be a true description of the competitor's business. *Material Men's M. Assn.* v. *N. Y. M. M. Assn., Inc.* (1915) 169 App. Div. 843, 155 N. Y. Supp. 706, *aff'd.*, 224 N. Y. 670, 121 N. E. 878. Since the original user of a descriptive term may exclude others only to the extent of preventing confusion in actual competition, the protection clearly rests, as in the instant case, not on property rights, but on the broader ground of unfair competition. *Material Men's M. Assn.* v. *N. Y. M. M. M. Assn., Inc., supra.*

TRUSTS—ESTOPPEL—CONSENT OF BENEFICIARY TO VIOLATION OF TRUST.—T devised realty in trust to pay over two-thirds of the income thereof to X during life, and upon X's death to sell the same and to invest one-fourth of the proceeds for the benefit of W. The trustee was also empowered to sell the realty at any time he saw fit. For the purpose of freeing the property of the trust, the trustee, with the consent of W, conveyed the property during X's lifetime to a sister of T, who executed a mortgage which was subsequently foreclosed and the cestuis interest wiped out. The executor of W now sues the executor of the trustee for an accounting. *Held,* two judges dissenting, for the plaintiff. *In re Wentworth* (1920) 230 N. Y. 176, 129 N. E. 646.

In the absence of statute it is well settled that the consent of a *cestui que trust, sui juris,* to an act in violation of the trustee's duty will prevent the former from holding the trustee responsible. *Preble* v. *Greenleaf* (1901) 180 Mass. 79, 61 N. E. 808; see 2 Perry, *Trusts* (6th ed. 1911) § 849. In New York, in cases where the trust is alienable, the rule is identical. *Ungrich* v. *Ungrich* (1909) 131 App. Div. 24, 115 N. Y. Supp. 413; *cf. Matter of Niles* (1889) 113 N. Y. 547, 21 N. E. 687. Assuming the court's construction of the trust, the beneficiary's interest was inalienable. N. Y. Cons. Laws (1909) c. 52 §103, c. 45 § 15. Moreover, the trust having been created in a written document, the conveyance by the trustee in contravention of the trust was void. N. Y. Cons. Laws (1909) c. 52 § 105. Nevertheless, it has been held that a beneficiary who induces a breach of trust and accepts benefits cannot hold the trustee personally responsible. *Woodbridge* v. *Bockes* (1901) 59 App. Div. 503, 69 N. Y. Supp. 417, *aff'd* (1902) 170 N. Y. 596, 63 N. E. 362; see *Sherman* v. *Parish* (1873) 53 N. Y. 483, 492. But a cestui is not estopped to assert that the conveyance was void. *Douglas* v. *Cruger* (1880) 80 N. Y. 15. In view of the statute these latter cases seem irreconcilable. The courts have been attempting to do justice to avoid fraudulent conduct by the beneficiary. It is to be noted that in the principal case the beneficiary received no benefits under the sale, and thus the result reached is in consonance with former decisions and the strict letter of the statutes. It must be admitted that the statutory provisions are deprived of much force by those decisions which estop a beneficiary from holding the trustee personally responsible, for each case is an alienation pro tanto, but they at least reach a result which fair dealing demands, although the letter of the law forbids.

VENDOR AND PURCHASER—LIEN AS INCUMBRANCE—TENDER—RESCISSION.—One Roberts and the defendants entered into a contract by which the defendants were to convey certain real estate without warranty, Roberts paying $100,000 to

bind the bargain, the money to be kept as liquidated damages if the vendee defaulted, or returned in case the defendants did not give title free from all incumbrances. The deed and a further installment of the purchase money were to be exchanged at a specified day and hour, time being made of the essence. When the hour for performance arrived, the vendee, discovering that two mechanic's liens were still outstanding, refused to take title until they were cleared, but offered to extend time for this purpose. The defendants' attorney, assuring the vendee that they would be removed, demanded that title be taken at once. This the vendee refused to do, but made no tender of the purchase price. The plaintiff, assignee of Roberts, now sues to recover the money advanced. *Held,* one judge dissenting, the money could be recovered. *Roberts* v. *New York Life Ins. Co.* (App. Div. 1st Dept. 1920) 186 N. Y. Supp. 422.

The general rule where the plaintiff seeks to rescind a contract and recover payments advanced, is that a tender of payment is necessary to put the defendant in default. *Shirley* v. *Shirley* (Ind. 1845) 7 Blackf. 452; *Arnett* v. *Smith* (1902) 11 N. Dak. 55, 88 N. W. 1037. But where the defendant has refused to perform, or disabled himself from performing, such tender is considered nugatory, and therefore unnecessary. *Primm* v. *Wise* (1905) 126 Iowa 528, 102 N. W. 427; *Sutthoff* v. *Maruca* (1910) 57 Wash. 102, 106 Pac. 632. If the action is for damages for breach of contract, the necessity for a tender is the same and may be similarly waived. *Holmes* v. *Holmes* (1851) 12 Barb. 137, *aff'd* (1854) 9 N. Y. 525; *Kerst* v. *Ginder* (Pa. 1856) 1 Pittsb. 314; but see *Bigler* v. *Morgan* (1879) 77 N. Y. 312, 318; *Eberz* v. *Heisler* (1900) 12 Pa. Super. Ct. 388, 391. Thus, the only question presented by the instant case is whether the existence of liens at the time set for performance is such a disability to perform as to make a tender unnecessary. It is not usually so considered. *Ziehen* v. *Smith* (1896) 148 N. Y. 558, 42 N. E. 1080; *Higgins* v. *Eagleton* (1897) 155 N. Y. 466, 50 N. E. 287. But this seems to be based on the theory that, since liens might be cleared in a few hours, their existence during part of the law day is not a clear disability. Where, however, as here, not the day alone, but the very hour of performance was made of the essence, it would seem that the existence of the liens is a disability to perform just as inability to pay because of lack of funds would be. The defendant might not have been in default, had he offered to accept the difference between the amount of the liens and purchase price. *Borden* v. *Borden* (1809) 5 Mass. 67. But this should not require the plaintiff to tender the difference; for suggestions as to changes in the terms of a contract should be made by the party to be benefited. Otherwise, such tender might well be nugatory.